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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
July 1, 2004)	WCB/Pricing 04-18
Annual Access Charge Tariff Filings)	DA 04-1049
)	
National Exchange Carrier Association, Inc.)	Transmittal No. 1030
Tariff F.C.C. No. 5)	

REPLY

The National Exchange Carrier Association Inc. (NECA), pursuant to section 1.773 of the Commission's rules, 47 C.F.R. § 1.773, submits this Reply to petitions filed by AT&T Corp. (AT&T)¹ and General Communications, Inc. (GCI)² in the above-captioned proceeding.

AT&T & GCI request that the Commission suspend and investigate NECA's June 16, 2004 tariff filing (Transmittal No. 1030). Section 1.773 of the Commission's rules requires that petitioners seeking suspension or rejection of a tariff filing must demonstrate that the challenged filing raises substantial questions of lawfulness and provide specific reasons why the proposed tariff revisions warrant investigation, suspension, or rejection.

For the reasons discussed below, neither petition meets this standard. Each should be denied, and NECA's proposed tariff revisions should be allowed to become effective as filed.

¹ Petition of AT&T Corp. (filed June 23, 2004) (*AT&T Petition*).

² Petition of GCI to Suspend and Investigate (filed June 23, 2004) (*GCI Petition*).

I. PETITIONERS' CLAIMS AS TO PAST PERIOD EARNINGS REPORTS ARE NOT RELEVANT TO THIS PROCEEDING AND IN ANY EVENT ARE OVERSTATED.

AT&T and GCI assert primarily that NECA's *previous* tariff rates have produced excessive earnings. Past tariff rates or rates of return have no bearing on the rates proposed in Transmittal No. 1030, which have been recalculated in order to produce earnings targeted to authorized levels. Evidence that some other tariff may have included inaccurate forecasts cannot be relied upon as a basis for suspending and investigating the proposed rates. Accordingly, to the extent that AT&T and GCI rely on evidence of prior earnings reports as a basis for their claims,³ the Commission must deny their petitions.

Even accepting, for the sake of argument, the relevance of claims regarding prior earnings reports, the Commission should refrain from relying on such data as justification for suspension and investigation of Transmittal No. 1030. AT&T and GCI conveniently ignore the fact that NECA's filing proposes a 7.1 percent *reduction* in switched access rates. This reduction comes on the heels of an even larger (7.9 percent) reduction in switched access rates in NECA's 2003 annual filing. These significant reductions make clear that NECA is, in fact, reacting appropriately to manage its tariff rates so that they earn at no more than authorized levels.

AT&T and GCI's claims are based, in part, on data from NECA Form 492 reports. As the notes to those reports explain, they are not representative of final earnings

³ GCI at least alleges flaws in NECA's current demand projections. *See, e.g., GCI Petition* at 3-4. While theoretically relevant, these claims are without merit and do not warrant suspension and investigation of any portion of Transmittal No. 1030. *See infra* at 8.

levels for the pools:

Some cost company reported expenses and investments included in NECA's FCC 492 report are based upon estimated data. Historically, expense and investment levels increase as companies begin reporting actual data. Considering this, it is expected that the rates of return reported on NECA's Form 492 report will decline as the companies update their studies. Also, Long Term Support, Interstate Common Line Support, and Local Switching Support payments are subject to true-ups pursuant to FCC rules.⁴

Analysis based on pool settlements data in recent years shows that companies tend to report adjustments to their costs to NECA's pools seven to twelve months after the end of the data year. These adjustments occur when actual costs reported to NECA for pool settlement true-ups after the end of the rate period exceed initial estimated pool settlement costs.⁵

Reported levels of special access cost and demand are especially volatile. Revenue requirements for 2001 in this category increased by approximately \$31 million, or 30%, from the end of 2001 to the end of 2003. Similarly, 2002 revenue requirement adjustments have increased by over 33% from the end of 2002 through May 2004.

AT&T and GCI both point to preliminary reports of 2003 special access earnings contained in NECA's March 2004 Monitoring Report, which displays earnings data in the special access category of approximately 17%. These results are based on data available as of February 2004, long before 2003 cost study data began to be reported to the pools. Since that time, true-ups have resulted in an increase in revenue requirement

⁴ See, e.g., NECA's Rate of Return Report, Form FCC 492 (filed March 31, 2004), *Additional Statements*.

⁵ As discussed in Volume 1 of the Annual Filing, NECA's pooling procedures, which have been in effect since the beginning of access charges, permit companies to report "trued-up" actual interstate costs to the Common Line (CL) and Traffic Sensitive (TS) Pools for a period of up to twenty-four months after the data month.

of 7.6% for 2003, causing earnings for the year to decrease to 15.62% as of the May 2004 view.

The following table compares special access earnings levels by year as reported in March following each year, as reported in NECA's Form 492, and as finalized:

FINAL SPECIAL ACCESS ROR 1993-2002

Year	SPECIAL		
	492 ROR MARCH *	492 ROR SEPT. **	FINAL ROR ***
1993	13.54%	13.79%	13.48%
1994	12.83%	12.02%	11.33%
1995	12.46%	12.86%	12.09%
1996	12.49%	11.16%	10.51%
1997	11.42%	9.49%	7.78%
1998	11.56%	11.28%	9.30%
1999	15.53%	12.58%	10.97%
2000	16.83%	11.87%	10.12%
2001	17.76%	13.39%	12.01%
2002	16.96%	13.06%	11.16%
AVERAGE	14.14%	12.15%	10.88%

NOTE:

- * "492 ROR MARCH" represents earnings as of February of the following year.
- ** "492 ROR SEPT." represents earnings as of August of the following year.
- *** "FINAL ROR" is as of December two years after the specific year. For 2002, data represents the reported ROR as of May 2004, which is projected to decline further during 2004.

The table demonstrates that NECA special access rates have achieved a rate of return (ROR) below authorized levels, both on average over the last ten years and in six of the last seven years. NECA is currently projecting that calendar year 2003 special access ROR will true-up to around 9.2% once the pool reporting window closes at the end of 2005. In this light, NECA's 3.8% increase in special access rates for the test period July 1, 2004 through June 30, 2005, is clearly reasonable.

Finally, evidence from prior period earnings reports is particularly irrelevant in the current telecommunications environment. NECA and its member companies face

tremendous unknowns due to new technologies, competition from new market players, new regulatory mandates, economic uncertainty, and a broad variety of other unprecedented factors that make earnings results harder than ever to predict.

Over recent years the industry has seen a dramatic rise in CMRS traffic⁶ and Internet usage,⁷ each of which, to an extent, has supplanted incumbent LEC real-time voice communications offerings and contributed to the decline in access lines and growth in minutes of use. While still a small market segment, Voice over Internet Protocol (VoIP) appears to be gaining traction.⁸ Additionally, NECA pool members find that their switches are increasingly burdened by traffic that arrives without the identifying information necessary to render access bills (whether as a result of inadvertent or deliberate data stripping by originating or transiting carriers). These factors and others make forecasting more difficult and render prior earnings reports — the principal data presented by AT&T and GCI — of little use as a predictor of future earnings.

⁶ CMRS subscribers have surpassed wireline incumbent LEC access lines, by more than five million, as incumbent LEC lines continue to drop. FCC, "Local Telephone Competition: Status as of December 31, 2003," (Jun. 2004), Tables 1 and 13.

⁷ The number of high-speed Internet access lines jumped twenty percent in only six months, from June to December 2003. FCC, "High-Speed Services for Internet Access: Status as of December 31, 2003," (Jun. 2004), Table 1.

⁸ Vonage, for instance, claims to be providing service to 170,000 "lines" (making over 5 million calls per week), while adding more than 20,000 lines per month to its network. See http://www.vonage.com/corporate/press_index.php?PR=2004_06_11_0 (viewed Jun. 25, 2004). At the same time, it seems that every major carrier and cable TV company is offering, or planning to offer, a VoIP service.

II. THE COMMISSION SHOULD NOT USE THE SUSPENSION REMEDY SET FORTH IN SECTION 204(a) OF THE COMMUNICATIONS ACT TO SUBVERT THE STATUTORY PROTECTION AFFORDED STREAMLINED TARIFFS.

AT&T and GCI's real concern is evident. Because NECA's filing was made on a streamlined basis, petitioners recognize that it must therefore be treated as "deemed lawful" under section 204 of the Act, and that refunds for potential overearnings would be unavailable once the tariff is permitted to become effective.⁹ In effect, AT&T and GCI are asking the Commission to suspend NECA's tariff "just in case" the proposed rates turn out to be too high.

Use of the Act's suspension remedy in this manner is patently unjustified. The Telecommunications Act of 1996 revised section 204 of the Act specifically to permit carriers to make filings on a streamlined basis and to have those filings be "deemed lawful." As the Commission itself and courts recognize, these revisions to the statute could only have been intended to make it faster and easier for carrier-initiated tariffs to become effective and to be insulated from refund liability once in effect.¹⁰ In asking for the opposite result, AT&T and GCI essentially suggest that the Commission should routinely suspend all tariff filings in hopes that this would prevent them from later attaining "deemed lawful" status.

⁹ *GCI Petition* at 1 ("Once this tariff takes effect, having been filed on 15 days notice, there will be no possibility of refunds as a remedy for overearnings generated for the period that the instant tariffed rates are in effect."); *AT&T Petition* at 6 ("retroactive refunds are no longer available after a tariff is permitted to take effect without suspension because the tariff is then 'deemed lawful'. . . . In these circumstances, ratepayers can only seek relief on a prospective basis").

¹⁰ *See, ACS of Anchorage, Inc. v. F.C.C.*, 290 F.3d 403, 410-412 (D.C. Cir. 2002); *Implementation Of Section 402(B)(1)(A) Of The Telecommunications Act Of 1996, Report and Order*, CC Docket No. 96-187, 12 FCC Rcd 2170, ¶¶ 18-24 (1997) (*Streamlined Tariff Order*).

The sham nature of such suspensions is readily apparent given the explicit procedural requirements of section 204. That portion of the Act permits the Commission to suspend a tariff for a maximum of five months,¹¹ and nominally requires that the Commission conclude investigations of suspended tariffs within five months after the tariffs are permitted to become effective.¹² Since the supposed object of the suggested investigation would be to determine whether the rates in fact produce overearnings, AT&T and GCI presumably would have the Commission allow the revised rates to become effective after suspension (in order to then determine what earnings they actually produce). In case of a one-day suspension, however, the Commission would need to conclude its investigation by December 2, 2004 – before the tariff-monitoring period ends, and long before final Form 492 reports become available.¹³ Furthermore, as noted above, NECA historically experiences earnings erosion for as long as 24 months after the final month of the monitoring period due to pool true-ups. This means that final earnings reports for the monitoring period will not be available until December 2006.

In other words, AT&T and GCI ask the Commission to suspend the tariff and conduct an investigation, knowing in advance that the results of the investigation cannot be determined by the time the investigation must, according to the statute, be completed. The only purpose for suspending the tariff, then, would be to attempt to strip it of its “deemed lawful” status under section 204(a).

Even assuming that this strategy would work, the Commission should not attempt

¹¹ 47 U.S.C. § 204(a)(1).

¹² 47 U.S.C. § 204(a)(2)(A).

¹³ If the Commission were to suspend portions of the tariff for the maximum five month period, its investigation would then need to conclude by May 2005.

to subvert Congress' intent by initiating sham investigations. The Commission has previously recognized that it has an obligation to give effect to the express language of section 204(a)(3).¹⁴ Suspending streamlined tariffs simply to evade "deemed lawful" protections would have the opposite effect and would clearly be considered arbitrary and capricious by a reviewing court.

III. GCI'S CLAIMS WITH RESPECT TO NECA'S RATE CALCULATIONS HAVE NO MERIT AND DO NOT WARRANT SUSPENSION AND INVESTIGATION OF TRANSMITTAL NO. 1030.

GCI's assertion that NECA excluded the effects of demand response from long distance service price changes from its forecasts, while including the effects of wireless substitution,¹⁵ is wrong. NECA's MOU forecasting model includes both a market price series for long-distance services and a cellular price series.¹⁶ Because NECA's MOU forecasting model works with "real price" effects, both the market price and the cellular price indices were deflated by a CPI index before inclusion in the model. As a result, both "real price" series decline slightly during the forecasted Test Period. For the Test Period, the price effects of those two variables fully offset each other, as was noted in Volume 3 of NECA's Tariff Filing.¹⁷

GCI's claims appear to be based on a misunderstanding of a statement made in NECA's filing regarding the effect of future price changes by IXCs.¹⁸ NECA's demand response calculations are in fact modeled *in the historical period*. NECA does not,

¹⁴ Streamlined Tariff Order at ¶ 19.

¹⁵ GCI Petition at 4.

¹⁶ NECA, Tariff FCC No. 5, Transmittal No. 1030, Volume. 3, p 6.

¹⁷ *Id.* at 7.

¹⁸ See GCI Petition at 4, quoting NECA Filing Volume 3 at 2, n.2.

however, attempt to model demand response during the Test Period because there is no reliable way to predict how IXCs will change their long-distance rates in the future. Similarly, NECA asserts no knowledge of how cellular carriers will change their rates in the future.¹⁹

GCI also asserts that NECA has improperly failed to change the terms of its interstate access tariff to comply with the *Second MAG Order*.²⁰ Specifically, GCI states that NECA should tariff a cross-connect charge to be applied in lieu of an entrance facility charge when the access customer is collocated in the NECA member company's end office.²¹ GCI further alleges that since NECA has not made this tariff change, its demand count for entrance facilities is too high and therefore its rate for entrance facilities is too low.

Although GCI attempts to portray its concerns regarding entrance facility charges as relating to NECA's demand estimates, GCI's concern is obviously directed at the tariff's rate structure, not rate levels, and so has no bearing in this proceeding. Tariff provisions calling for the assessment of entrance facility charges have been in effect in NECA's tariff since 1993 and are not subject to challenge here.

In any event, NECA's entrance facility charges (and associated estimates of demand) are completely consistent with the Commission's *Second MAG Order*. In that

¹⁹ Accordingly, forecast period model prices for cellular and long distance are set to the last recorded values of February 2004, and no attempt is made to forecast changes to the nominal price indexes beyond that point.

²⁰ Multi-Association Group (MAG) Plan for Regulation of Interstate Service of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Federal-State Joint Board on Universal Service, *Report and Order and Second Further Notice of Proposed Rulemaking*, CC Docket Nos. 00-256, 96-45, 19 FCC Rcd 4122 (2004) (*Second MAG Order*).

²¹ GCI Petition at 8-10.

proceeding the Commission required a local exchange carrier to establish cross-connect elements only where the LEC proposes geographic deaveraging of transport or special access rates.²² NECA's tariff participants have not proposed to deaverage their transport rates at this time, and accordingly are not required to tariff cross-connect elements.²³ Should the need for geographic deaveraging arise, NECA will propose the necessary structural changes to its tariff in a separate filing.

²² Second MAG Order at ¶31.

²³ GCI concedes as much when it admits that the policy in favor of tariffing cross-connects "makes sense even in those situations where the rate of return ILEC does not seek to geographically deaverage its transport rates." *GCI Petition* at 9-10. The fact that this approach might "make sense" to GCI does not necessarily mean that tariffing cross connects would be desirable for NECA pool participants, especially given the low demand for collocation facilities in rural areas.

IV. CONCLUSION

AT&T and GCI have failed to provide sufficient basis for suspending and investigating NECA's 2004 annual tariff filing. Neither petitioner has adequately challenged the lawfulness of NECA's tariff, or met the standards of section 1.773 to warrant suspension and investigation of the tariff filing. NECA's tariff filing should therefore be allowed to become effective on July 1, 2004, the scheduled date.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of NECA's Reply was served this 29th day of June 2004, by electronic filing, electronic mail, facsimile transmission, or U.S. Mail to the persons listed below.

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